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SB 1011 Water rights.
BILL NUMBER: SB 1011

AMENDED 08/27/98

BILL TEXT

AMENDED IN ASSEMBLY AUGUST 27, 1998
AMENDED IN ASSEMBLY AUGUST 11, 1998
AMENDED IN SENATE JANUARY 12, 1998

INTRODUCED BY Senator Costa

FEBRUARY 27, 1997

An act to amend Sections 1011 and 1707 of, to add Sections 1014, 1015, 1016, and 1017 to, and to repeal and add Sections 1726, 1727, and 1732 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

SB 1011, as amended, Costa. Water rights.

(1) Existing law declares that when any person entitled to the use of water under an appropriative right fails to use all or part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriative water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. Existing law declares that where water appropriated for irrigation purposes is not used by reason of land fallowing, the reduced usage shall be deemed to constitute water conservation for the purposes of that provision.

This bill would, instead, provide that where water appropriated for irrigation purposes is not used {- as a result of temporary land management practices used in the course of normal and customary agricultural production to maintain or promote the productivity of agricultural land -} {+ by reason of temporary land fallowing +}, the reduced usage shall be deemed to constitute water conservation for the purposes of that provision.

(2) Existing law regulates water transfers.

This bill would provide that the transfer {- or exchange -} of water shall not cause, or be the basis for, a forfeiture, abandonment, or modification of any water right, contract right, or other right to the use of that water. The bill would prohibit certain transactions relating to the transfer of water from being used as evidence of waste or unreasonable use, or of cessation of use, of the water made available for transfer {- or exchange -}. The bill would require, during the term of a {- water transfer or exchange agreement, compliance with -} {+ temporary change, as defined, if an enforcement action or other proceeding is commenced that alleges that the use of water violates +} certain limitations on the water that is subject to that water transfer {- or exchange -} {- to -} {+ , that the determination of the alleged violation +} be {- determined -} based on an assessment of the {- reasonableness of the -} transferee's use of the transferred water. The bill would require a transferred water right to revert from the transferee to the transferor under specified conditions. The bill would prohibit a transferee or any beneficiary of a transfer {- or exchange -} from bringing any claim for a continuation of the water supply made available by a transfer {- or exchange -} agreement or otherwise claiming any right to a continued supply

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of water as a result of the transfer {- or exchange -} beyond the term of the transfer {- or exchange -} agreement. The bill would {- require any reduction in the use of water for the purpose of transferring or exchanging the amount so reduced in accordance with specified existing law to be deemed to be a reasonable and beneficial use of water -} {+ prohibit any transfer of water pursuant to any law from causing a forfeiture, diminution, or impairment of any water right and would require a transfer of water that is approved pursuant to that specified existing law to be deemed to be a beneficial use of that water by the transferor +} .

(3) Existing law authorizes a person entitled to the use of water to petition the State Water Resources Control Board for a change in a point of diversion, place of use, or purpose of use of that water for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water, if the state board determines that the proposed change meets specified requirements.

This bill would provide that, {- if so requested by -} {+ upon the request of +} the petitioner, {+ the state board may specify as part of its approval of the petition that +} any water that is subject to {- a petition granted pursuant to these provisions -} {+ the approval +} shall be in addition to water that is required, if any, to be used for instream purposes to meet certain federal, state, {- and -} {+ or +} local regulatory requirements. The bill would, {- in the absence of that request -} {+ except as provided +} , {- require -} {+ authorize +} water that is subject to a petition granted pursuant to these provisions to be used to meet, in whole or in part, those requirements, as prescribed. The bill would specify related matters.

(4) Existing law provides procedures for temporarily changing the point of diversion, place of use, or purpose of use involving the transfer of water.

This bill would revise and recast those procedures, including prescribed procedures for petition, notice, review, protest, and decision regarding a proposed change.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

SECTION 1. This act shall be known and may be cited as "The Water Rights Protection and Expedited Short-Term Water Transfer Act of 1998." {-

SEC. 2. Section 1011 of the Water Code is amended to read:

1011. (a) (1) When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

(2) The board may require that any user of water who seeks the benefit of this section file periodic reports describing the extent and amount of the reduction in water use due to water conservation efforts. To the maximum extent possible, the

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reports shall be made a part of other reports required by the board relating to the use of water. Failure to file the reports shall deprive the user of water of the benefits of this section.

(3) For purposes of this section, the term "water conservation" shall mean the use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right. Where water appropriated for irrigation purposes is not used as a result of temporary land management practices used in the course of normal and customary agricultural production to maintain or promote the productivity of agricultural land, the reduced usage shall be deemed water conservation for purposes of this section.

(b) Water, or the right to the use of water, the use of which has ceased or been reduced as the result of water conservation efforts as described in subdivision (a), may be sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer.

(c) Notwithstanding any other provision of law, upon the completion of the term of a water transfer agreement, or the right to the use of that water, that is available as a result of water conservation efforts described in subdivision (a), the right to the use of the water shall revert to the transferor as if the water transfer had not been undertaken. -) {+

SEC. 2. Section 1011 of the Water Code is amended to read: +)

1011. (a) When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

The board may require that any user of water who seeks the benefit of this section file periodic reports describing the extent and amount of the reduction in water use due to water conservation efforts. To the maximum extent possible, the reports shall be made a part of other reports required by the board relating to the use of water. Failure to file the reports shall deprive the user of water of the benefits of this section.

For purposes of this section, the term "water conservation" shall mean the use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right. Where water appropriated for irrigation purposes is not used by reason of (+ temporary +) land fallowing or crop rotation, the reduced usage shall be deemed water conservation for purposes of this section.

(b) Water, or the right to the use of water, the use of which has ceased or been reduced as the result of water conservation efforts as described in subdivision (a), may be sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer.

(c) Notwithstanding any other provision of law, upon the

completion of the term of a water transfer agreement, or the right to the use of that water, that is available as a result of water conservation efforts described in subdivision (a), the right to the use of the water shall revert to the transferor as if the water transfer had not been undertaken.

SEC. 3. Section 1014 is added to the Water Code, to read:

1014. The transfer {- or exchange -} of water shall not cause, or be the basis for, a forfeiture, abandonment, or modification of any water right, contract right, or other right to the use of that water. An offer of water for transfer {- or exchange, contract negotiations, or a transfer or exchange -} {+ , contract negotiations, or a transfer +} agreement shall not be used as evidence of waste or unreasonable use, or of cessation of use, of the water made available for transfer {- or exchange -}.

SEC. 4. Section 1015 is added to the Water Code, to read: {-

1015. During the term of a water transfer or exchange agreement, compliance with Section 2 of Article X of the -} {+

1015. During the term of a temporary change, as defined in Section 1728, if an enforcement action or other proceeding is commenced that alleges that the use of water violates Section 2 of Article X of the +} California Constitution, Sections 100, 101, 1410, and 1675, {- and -} {+ or +} any other legislative, administrative, or judicial limitation on the water that is subject to that water transfer {- or exchange, shall be determined -} {+ and the water involved is, at the time of the alleged violation, subject to a water transfer, the determination of the alleged violation shall be +} based on an assessment of the {- reasonableness of a -} transferee's use of transferred water. If a transferee's right to use transferred water is divested, in whole or in part, on the basis of the transferee's abandonment, forfeiture, waste, or unreasonable use of the transferred water, the divested portion of the right shall revert immediately to the transferor.

SEC. 5. Section 1016 is added to the Water Code, to read:

1016. (a) At the conclusion of the term of a water transfer {- or exchange -} agreement, all rights in, and the use of, the water subject to the agreement revert back to the transferor.

(b) After the conclusion of the term of a water transfer {- exchange -} agreement, the transferee or any beneficiary of the transfer {- or exchange -} shall not do either of the following:

(1) Bring any claim for a continuation of the water supply made available by the agreement.

(2) Claim any right to a continued supply of water as a result of the transfer {- or exchange -}, based on reliance, estoppel, intervening public use, prescription, water shortage emergency, or unforeseen or unforeseeable increases in demand, or any other cause.

SEC. 6. Section 1017 is added to the Water Code, to read: {-

1017. Any reduction in the use of water for the purpose of transferring or exchanging the amount so reduced in accordance with Section 1011 shall be deemed to be a reasonable and beneficial use of water. -} {+

1017. No transfer of water pursuant to Section 1011 or any other provision of law shall cause a forfeiture, diminution, or impairment of any water right. A transfer of water that is approved pursuant to Section 1011 or any other provision of law shall be deemed to be a beneficial use of that water by the transferor. +}

SEC. 7. Section 1707 of the Water Code is amended to read:

1707. (a) (1) Any person entitled to the use of water, whether based upon an appropriative, riparian, or other right, may petition the board pursuant to this chapter, Chapter 6.6 (commencing with Section 1435) or Chapter 10.5 (commencing with Section 1725) for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.

(2) The petition may be submitted for any of the purposes described in paragraph (1) and may, but is not required to, be submitted in combination with a petition to make any other change authorized pursuant to this part. The petition shall specify the time, location, and scope of the requested change, and other relevant information relating thereto.

(b) The board may approve the petition filed pursuant to subdivision (a), subject to any terms and conditions which, in the board's judgment, will best develop, conserve, and utilize, in the public interest, the water proposed to be used as part of the change, whether or not the proposed use involves a diversion of water, if the board determines that the proposed change meets all of the following requirements:

(1) Will not increase the amount of water the person is entitled to use.

(2) Will not unreasonably affect any legal user of water.

(3) Otherwise meets the requirements of this division.

(c) (1) {- If so requested by the petitioner, -} {+ Upon the request of the petitioner, the board may specify, as part of its approval of the petition, that +} the water that is subject to {- a petition granted -} {+ the approval +} pursuant to this section shall be in addition to water that is required, if any, to be used for instream purposes to satisfy any applicable federal, state, {- and -} {+ or +} local regulatory requirements governing water quantity, water quality, instream flows, fish and wildlife, wetlands, recreation, and other instream beneficial uses. If the request is approved by the board, {- federal, state, -} {+ state +} and local agencies, as well as the courts, shall not credit the water subject to that petition towards compliance with any of the regulatory requirements described in this subdivision. {+ A federal agency shall comply with the requirement imposed by this paragraph to the extent required by federal law, or to the extent that it chooses to comply. +}

(2) For the purposes of this subdivision, "requirements" include requirements or obligations that have not been formally established or allocated at the time of the petition, and obligations under any agreement entered into to meet those requirements. Neither any petition filed pursuant to this section {+ , +} nor any documents or statements made in connection therewith {+ , +} shall be construed or used as an admission, evidence, or indication of any obligation to meet any of the requirements described in this subdivision. {-

(d) In the absence of a request described in -} {+

(d) Except as provided in +} subdivision (c), water that is subject to a petition granted pursuant to this section shall be used to meet, in whole or in part, any requirement described in subdivision (c) {+ , if any of those requirements exist +}. The water shall be credited to the petitioner, or to any other person or entity designated by the petitioner, whenever that person or entity has, or may have, obligations to meet one or more of the requirements described in subdivision (c). The water shall be credited towards compliance with any requirements described in subdivision (c), by {- federal, state, -} {+ state +} and local agencies, as well as the courts. {+ A federal

agency shall comply with the requirement imposed by this subdivision to the extent required by federal law, or to the extent that it chooses to comply. +}

SEC. 8. Section 1726 of the Water Code is repealed.

SEC. 9. Section 1726 is added to the Water Code, to read:

1726. (a) A permittee or licensee who proposes a temporary change shall submit to the board a petition to change the terms of the permit or license as required to accomplish the proposed temporary change. Any petition for a temporary change shall be filed by the permittee or licensee. If the proposed temporary change is for the benefit of a contractor or user supplied directly or indirectly by the permittee or licensee, the permittee or licensee may authorize the contractor or user to participate as a copetitioner. The permittee or licensee shall identify any copetitioner in the petition.

(b) A petition shall include all of the following:

(1) Proof that the transferor has the legal right to use the water proposed to be transferred throughout the term of the proposed temporary change.

(2) A written description of the changes in water storage, timing, and point of diversion, place and purpose of use, timing and point of return flow, and water quality of instream flows that are likely to occur as a result of the proposed temporary change.

(3) A copy of the water transfer (- or water exchange -) agreement. The petitioner may omit the financial terms of the agreement from its submission to the board.

(c) A petitioner shall provide a copy of the petition to the Department of Fish and Game, the board of supervisors of the county or counties in which the petitioner currently stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred.

(d) Within 10 days of the date of submission of a petition to the board, the petitioner shall publish in not less than one newspaper of general circulation, in the county or counties in which the petitioner currently stores or uses the water subject to the petition, a notice of the petition and a brief description of the terms of the proposed temporary change. The board shall, in a timely manner, provide to the petitioner a list of water right holders of record on file with the board (- on the affected watercourses -) (+ who may be affected by the transfer, +) and the petitioner shall provide written notice to those water right holders not later than 10 days after the date on which the petition is submitted. The board shall post the notice of petition on its Internet web site not later than 10 days after the date on which the petition is submitted. The notice of the petition shall specify the date on which protests are due. The board may impose on the petitioner any other notice requirement it determines to be necessary.

(e) Within 10 days of the date of receipt of a petition, the board shall commence an investigation of the proposed temporary change. Pursuant to that investigation, the board shall determine if the (- petitioner has a valid water right to use the water included in the petition throughout the term of the proposed temporary change -) (+ water proposed to be transferred would have been consumptively used or stored pursuant to the petitioner's permit or license in the absence of the proposed transfer +) . The board also shall evaluate the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, water quality, and instream flows, (+ availability of water within the watershed of the transferor, +) and other changes that are likely to occur as a result of the proposed temporary change.

(f) Water users that may be affected by a proposed temporary change and any other interested party may file a written protest regarding a petition with the board. Protests shall be filed not later than 30 days after the date {- that the board commences an investigation pursuant to subdivision (e) -} {+ that the notice was published pursuant to subdivision (d) +} . The board shall evaluate and take into consideration all protests that are filed in a timely manner.

(g) (1) Except as specified in paragraphs (2) and (3), the board shall render a decision on the petition not later than 30 days after the date that investigation commenced {+ or the date that the notice was published, whichever is later +} . The board's decision shall be in accordance with the substantive standards set forth in Section 1727. The board shall explain its decision in writing and shall send copies of the decision to the petitioner, the Department of Fish and Game, the board of supervisors of the county or counties described in subdivision (c), {- the water rights holders of record identified pursuant to subdivision (d), -} the proposed transferee, and any party who has filed a written protest in accordance with subdivision (f).

(2) If protests are filed in accordance with subdivision (f), or for any other good cause, the board may extend the date of its decision for up to 20 days.

(3) If the board or the petitioner determines that an additional extension of time for a decision is necessary for the board to make the findings required by Section 1727, or that a hearing is necessary for the board to make those findings, the board may extend the time for {+ a +} decision with the consent of the petitioner. If the petitioner agrees to a hearing, the board shall identify the issues for which additional evidence is required and shall fix a time and place for the hearing. The board shall provide notice of the time, place, and subject matter of the hearing to the petitioner, the Department of Fish and Game, the board of supervisors of the county or counties described in subdivision (c), the water right holders of record identified pursuant to subdivision (d), the proposed transferee, and any party who has filed a written protest in accordance with subdivision (f).

SEC. 10. Section 1727 of the Water Code is repealed.

SEC. 11. Section 1727 is added to the Water Code, to read:

1727. (a) The board shall review a petition for a temporary change of water rights in accordance with this section.

(b) The board shall approve a temporary change if it determines that a preponderance of the evidence shows both of the following:

(1) The proposed temporary change would not injure any legal user of the water, during any potential hydrologic condition {+ that the board determines is likely to occur during the proposed change +} , through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows.

(2) The proposed temporary change would not unreasonably affect fish, wildlife, or other instream beneficial uses.

(c) The petitioner shall have the burden of establishing that a proposed temporary change would comply with paragraphs (1) and (2) of subdivision (b). If the board determines that {+ that +} petitioner has established a prima facie case, the burden of proof shall shift to any party that has filed a protest pursuant to subdivision (f) of Section 1726 to prove that the proposed temporary change would not comply with paragraphs (1) and (2) of subdivision (b).

(d) In reviewing a petition for a temporary change, the board

shall not modify any term or condition of the petitioner's permit or license, including those terms that protect other legal users of water, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change in accordance with this article.

(e) In applying the standards set forth in paragraphs (1) and (2) of subdivision (b), the board shall not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change. Neither the Department of Fish and Game (+, +) nor any other state agency that comments on the proposed temporary change (+, +) shall propose conditions to mitigate effects on fish, wildlife, or other instream beneficial uses caused by factors other than the proposed temporary change. This subdivision does not limit the board, the Department of Fish and Game, or any other state agency, in proceedings pursuant to any provision of law other than this article.

SEC. 12. Section 1732 of the Water Code is repealed.

SEC. 13. Section 1732 is added to the Water Code, to read:

1732. The petitioner shall not initiate or increase the use of groundwater to replace surface water transferred {- or exchanged -} pursuant to this article, except in compliance with this article and Sections 1745.10 and 1745.11.

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